No. 76-1148

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

RAY MARSHALL,
SECRETARY OF LABOR, ET AL.,

Appellants,

vs.

BARLOW'S, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

BRIEF FOR THE APPELLEE

JOHN L. RUNFT, ESQ.
IVER J. LONGETEIG, ESQ.
DAVID J. STECHER, ESQ.
RUNFT & LONGETEIG, CHARTERED
420 West Bannock Street
Post Office Box 958
Boise, Idaho 83701

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STATEMENT

Appellee, Barlow's, Inc. (hereinafter referred to as Barlow's), is an Idaho corporation located in Pocatello, Idaho (App. 24). Barlow's has been in business installing electrical, plumbing and airconditioning equipment for approximately seventeen years in the vicinity of Pocatello, Idaho (App. 24-25). Some of the materials, such as sheet metal, used by the company in its fabrication and installation business is produced outside of the State of Idaho (App. 25). Whereas Barlow's has State of Idaho electrical and plumbing licenses, no aspect of this business is licensed by the United States or any agency thereof (App. 25).

At 11:00 A.M. on September 11, 1975, an OSHA inspector entered into the customer service area of the business, presented his credentials and explained the purpose of his visit to Ferrol G. "Bill" Barlow, the company's president and general manager (App. 25). Following the initial interview, the OSHA inspector indicated to Mr. Barlow that he was prepared to conduct a "general schedule" investigation of the non-public portion of the business, which portion is completely walled off from the public and customer service area (App. 25). Upon Mr. Barlow's inquiry, the inspector advised him that there had been no complaints against the business and that it was merely a routine inspection (App. 25-26). At this time Mr. Barlow inquired whether the inspector had a search warrant and denied the inspector the right to inspect the non-public area of the premises upon learning that he did not have such a warrant (App. 25). When asked by the inspector why he refused to allow the inspection, Mr. Barlow said that the Fourth Amendment required that a warrant be obtained (App. 25). All parties agree that the OSHA inspector did not have cause, probable or otherwise, to believe a violation existed, nor was he in possession of a complaint by an employee of Barlow's (J.S. App. A 2a).

Following Mr. Barlow's refusal, the Secretary of Labor (hereinafter referred to as the Secretary) delayed seeking compulsory process to authorize entry until December 13, 1975, at which time the Secretary petitioned the court below for an order compelling entry, inspection and investigation (J.S. App. A 2a). At a show cause hearing on December 30, 1975, the Secretary's petition was granted and an order entered

authorizing entry by OSHA into Barlow's premises for inspection purposes (J.S. App. A 2a).

On January 5, 1976, the court's order was presented to Mr. Barlow, and he again declined to permit the inspection. The next day Barlow's filed the instant action requiring the convening of a three-judge court to enjoin the enforcement of the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651, et seq., on the ground of repugnance to the Fourth Amendment of the United States Constitution (J.S. App. A 3a).

On page 10 of his brief, the Secretary recites that on January 15, 1976, a single judge denied Barlow's request for preliminary relief. It should be pointed out that the denial of the preliminary relief referred to was based on the court's assumption, expressed on the record, that the U.S. Attorney would not proceed with any contempt proceedings in the collateral matter[1] pending a decision by the three-judge panel, which was formed at this same hearing. Barlow's was invited by the court reapply for preliminary relief if this assumption of the court proved wrong. As a result of these comments by the court, a stipulation was entered into by the parties in the collateral inspection case to stay prosecution of that matter pending the outcome of the instant case.

Barlow's is satisfied with the accuracy of the remainder of the Secretary's statement of the proceedings below.

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[1] *In the Matter of Establishment Inspection of Barlow's, Inc.*, Civil No. 4-75-58 (D. Idaho, filed Dec. 13, 1975).

SUMMARY OF ARGUMENT

I

At issue in this case is the constitutionality of warrantless inspections conducted pursuant to Section 8(a) of the Occupational Safety & Health Act of 1970, 84 Stat. 1598, 29 U.S.C. §§ 651, et seq. This Court's holdings in the companion cases of *Camara vs. Municipal Ct.*, 387 U.S. 523 (1967), and *See vs. City of Seattle*, 387 U.S. 541 (1967), established the rule that, except in certain carefully defined classes of cases, an administrative inspection of a corporation's private commercial property is "unreasonable" unless conducted pursuant to a search warrant issued by an independent judicial officer. The Secretary relies on two of this Court's cases which narrowed the scope of the doctrine developed in *Camara* and *See: Colonnade Catering Corp. vs. U.S.*, 397 U.S. 72 (1970), upholding the warrantless inspection of the premises of a licensed retail liquor dealer, and *U.S. vs. Biswell*, 406 U.S. 311 (1972), permitting the warrantless inspections of licensed firearms dealers. However, in *Almeida-Sanchez vs. U.S.*, 413 U.S. 266 (1977), this Court construed its holdings in *Colonnade* and *Biswell* and found that the exceptions to the *Camara* and *See* rule were limited to governmentally licensed and pervasively regulated enterprises. The rule of *Camara* and *See*, as reaffirmed in *Almeida-Sanchez*, was again confirmed in *Air Pollution Variance Bd. vs. Western Alfalfa Corp.*, 416 U.S. 861 (1974), in express terms and in the context of administrative inspections conducted for the purpose of promoting health and sanitation.

A considerable body of judicial opinion has developed

throughout the federal and state courts regarding the meaning and constitutionality of the inspection provisions of OSHA from the vantage point of this Court's decisions in *Almeida-Sanchez* and *Western Alfalfa*. With a nearly unanimous voice in many exceptionally well-reasoned decisions, these courts have held that warrantless OSHA inspections violate the Fourth Amendment of the United States Constitution.

II

Despite the scope of OSHA's jurisdiction being extremely broad and the congressional findings supporting it inspecific, the Secretary contends that the administrative safeguards contained in OSHA for the conduct of inspections are constitutionally sufficient because the privacy interests of employers in their commercial workplaces occupied by employees is very limited. An analysis of the historical development of the Fourth Amendment refutes the Secretary's position that such privacy interests of an employer are limited or diminished by the presence of employees. Despite pre-Revolutionary rhetoric exhorting against the prospect of British intrusion into hearth and home, the historical record clearly shows that the intrusion complained of occurred in business and commercial settings as a result of the British attempt to suppress smuggling. Hence, the Fourth Amendment safeguards were developed to remedy unreasonable governmental intrusion into workplaces as well as homes. The Fourth Amendment safeguards did not result from a wave of popular political opinion. Rather, the genesis of these safeguards was the unheralded, but intense, struggle between Colonial judges and the English executive. Hence, there is an element of separation of powers

involved here. Speaking in terms of the rights of the people, the Fourth Amendment represents a judicial check of the executive's power to intrude into non-public interests, be they domestic or commercial. Therefore, the Fourth Amendment protection of privacy interests can, in some instances, have little to do with "privacy" in the sense of solitude or confidentiality. The people's right to be protected in their persons (individual and corporate) from governmental intrusion is the definition of this privacy interest, which is quite absolute. These privacy interests are never "diminished" or "limited" by a governmental interest to inspect as argued by the Secretary.

These absolute privacy interests are, however, subject to reasonable governmental search. The question is not one of balancing these privacy interests against the interests of the government to search. Since these privacy interests are absolute, no such balancing is possible. As brought out in *Camara*, the question is not a matter of balancing privacy interests against governmental interest; rather it is a question of the reasonableness of the search. The "governing principle" reaffirmed by *Camara* requires that, except in certain carefully defined classes of cases, every nonconsensual official intrusion into privacy interests is "unreasonable" unless it has been authorized by a valid search warrant. The issue in this case is whether the inspection sought by the inspector can be made without a warrant and not whether a search warrant should be issued on the facts.

In determing whether the proposed governmental intrusion falls into the narrow class of cases excepted

from the warrant requirement, *Camara* advises that the question is whether the burden of obtaining a warrant is likely to frustrate the government's purpose behind the search. The only relevant civil purposes recognized by this Court as not subject to frustration by the warrant procedure are described in *Colonade* and *Biswell* and delimited by the decisions of *Almeida-Sanchez* and *Western Alfalfa:* purposes associated with licensing and pervasive regulation by government. There are no licensing programs under OSHA. The regulatory provisions of OSHA, both in purpose and effect, do not regulate or control the nature, operation, or purpose of any particular businesses or industries or types of industries. The purpose of OSHA is to protect the safety and health of employees, not to regulate the conduct or operation of any particular enterprise or types of enterprise. Since "pervasive" regulation has been defined by *Colonnade* and *Biswell*, as construed by *Almeida-Sanchez* and *Western Alfalfa*, to mean the licensing and/or detailed, close regulation of the purpose, operation, and conduct of particular businesses, OSHA inspections cannot constitutionally be excepted from warrant requirements. This Court has often rejected and should continue to reject appeals such as the Secretary's to broaden the category of excepted warrantless searches on grounds of administrative efficiency and efficacy of administrative safeguard procedures.

III

Administrative search warrants suggested by *Camara* need not be "synthetic". Based on probable cause in a civil context, they consider facts other than those arising in criminal situations. The facts involved in

criminal contexts are almost universally concerned with an individual. Facts beyond the context of individuals' concerns must be considered in determining probable cause in administrative warrants. 'Probable cause' is the standard by which particular decision to search is tested against the constitutional mandate of reasonableness." *Camara*, 387 U.S. at 534. It is here, in the determination of the probable cause standard for the issuance of a search warrant, that the only "balancing test" arises. As shown earlier, there is no balancing test afforded for determining whether a proposed search should be excepted from warrant requirements. However, in determining what is reasonable, the need to search is balanced against the absolute privacy interests which will be invaded. Whereas these privacy interests are not flexible, the need to search and procedural safeguards involved in the search are flexible and should be considered in determining reasonableness by the independent judicial officer supervising the search. In its argument, Barlow's sets forth several standards which, it submits, should be considered in the issuance of all civil warrants. The Secretary's position that administrative inspection warrants might be issued by a reviewing magistrate simply on the basis of the OSHA statutory safeguard should be summarily rejected by the Court.

IV

A careful study of the legislative history of OSHA conclusively demonstrates two facts: (1) Congress intended the inspection program of OSHA to be conducted on the basis of warrantless entry, and (2) Congress was aware of the possible constitutional infirmity

of such a program. The minority report of the House Committee on Education and Labor succinctly spelled out the constitutional dangers of providing for warrantless searches in the context of OSHA's broad jurisdiction and purpose. The minority report expressly referred to the holdings of *Camara* and *See* and the need for judicial supervision—particularly in the context of the broad extension of governmental intrusion proposed by OSHA. Nevertheless, the bill's author, Congressman William Steiger, made it clear that warrantless inspection authority was essential to the program enacted by Congress. In other words, the inspection program designed by Congress was constructed around the concept of warrantless inspections and affirmatively rejected a program based on inspections conducted pursuant to search warrants. Barlow's submits that to judicially impose an inspection program based on a warrant procedure would directly contradict the intent of Congress. Therefore, it is submitted that this Court's proper action should be to affirm the decision of the court below that Section 8(a) is unconstitutional and void.

ARGUMENT

I

THE HOLDINGS OF *CAMARA* AND *SEE* CONTROL AND SUPPORT THE DECISION OF THE DISTRICT COURT BELOW THAT WARRANTLESS § 8(a) OSHA INSPECTIONS VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

"[O]ne governing principle, justified by history and by current experience, has consistently been fol-

lowed: Except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara vs. Municipal Ct.*, 387 U.S. 523, 528-529 (1967).

The principle recited above by the Court in *Camara vs. Municipal Ct. supra*, forms the basis upon which the court below built the framework of its decision that warrantless inspections purportedly conducted under Section 8(a) of the Occupational Safety and Health Act of 1970, 84 Stat. 1598, 29 U.S.C. § 657(a) (hereinafter referred to as Section 8(a) of the Act), are unconstitutional as repugnant to the Fourth Amendment of the United States Constitution[2] and that Section 8(a) of the Act is unconstitutional and void as mandating such warrantless inspections. J.S. App. A 5a-6a. In *Camara*, appellant was awaiting trial upon a criminal charge of violating the San Francisco Housing Code by refusing to give permission to a city housing inspector to inspect his residence without a search warrant.[3] In expressly overruling *Frank vs. Maryland*,

[2]The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

See Brief for the Appellants, pp. 3-4, for the text of Section 8(a) of the Act.

[3]The inspector sought to inspect pursuant to § 503 of the San Francisco Housing Code, which provides as follows:

"Section 503. RIGHT TO ENTER BUILDING. Authorized employees of the city departments or city agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure or premises in the city to perform any duty imposed on them by the municipal code." Another section of the housing code provided for criminal penalty for refusal to allow such an inspection. *See, Camara vs. Municipal Ct.*, 387 U.S. at 526, 527.

359 U.S. 360 (1959)[4], this Court concluded that Mr. Camara had a constitutional right to insist that the inspectors obtain a search warrant and that he could not be constitutionally convicted for refusing to consent to the inspection. 387 U.S. at 540.

Frank vs. Maryland and its progeny were likewise expressly overruled by the companion case to *Camara: See vs. City of Seattle*, 387 U.S. 541 (1967). Norman See sought reversal of his conviction for refusing to admit the Seattle Fire Department's representative (also lacking probable cause) to make a warrantless inspection of his locked commercial warehouse. The proposed inspection was part of a routine, city-wide program conducted pursuant to city ordinance.[5]

In combining the holdings of these cases, the Court in *See* noted that "in *Camara*, we held that the Fourth Amendment bars prosecution of a person who has refused to permit a warrantless code inspection of his personal residence. The only question which this case presents is whether *Camara* applies to similar inspections of commercial structures which are not used as private residences." 387 U.S. at 542. On this issue, the Court held:

[4]In *Frank vs. Maryland*, 359 U.S. 360 (1959), by a five-to-four vote, this Court upheld a long line of cases in sustaining the conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect his premises without a search warrant. In *Eaton vs. Price*, 364 U.S. 263 (1960), a similar conviction was affirmed by an equally divided Court.

[5]Seattle City Ordinance No. 87870, c8.01 provided the authority for the inspection program, and Mr. See was arrested and charged with violation of subsection 8.01.050 of the code which provided as follows:

"INSPECTION OF BUILDING AND PREMISES. It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, or any violations of the provisions of this title, and of any other ordinance concerning fire hazards." 387 U.S. at 541.

"[W]e see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in *Camara*, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has the right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." 387 U.S. at 543.

In holding that Mr. See could not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry into his locked warehouse, this Court concluded "that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure." 387 U.S. at 545.

It was clear that the court below was of the opinion that, taken together, *Camara* and *See* stand for the proposition that while non-consensual administrative inspections of commercial premises are authorized, such inspections may only be accomplished upon presentation of a warrant based upon satisfaction of a

flexible probable cause standard.[6] However, in reaching its decision, the court below had to consider two subsequent decisions of this Court allowing warrantless inspections. In *Colonnade Catering Corp. vs. U.S.*, 397 U.S. 72 (1970), the Court narrowed the scope of its holding in *Camara* by allowing warrantless inspection of the premises of a retail liquor dealer. Similarly, in *U.S. vs. Biswell*, 406 U.S. 311 (1972), the *Colonnade* reasoning was expanded to permit warrantless inspections of firearms dealers. Nevertheless, in the light of more recent precedent[7] available at the time of the decision hereinbelow, the Idaho district court in the present case construed *Colonnade* and *Biswell* as narrow exceptions to *Camara* and *See*, fitting into the *Camara* categorization of "certain carefully defined classes of cases" (J.S. App. A 7a):

> "We simply cannot overlook the fact that in *Colonnade* and *Biswell* the Court dealt with an 'industry long subject to close supervision and inspection' (*Colonnade*, 397 U.S. at 77), and a 'pervasively regulated business' (*Biswell*, 406 U.S. at 316). We believe that both of these cases fit into the *Camara* categorization of 'certain carefully defined classes of

[6] On a similar fact situation dealing with a warrantless, non-consensual OSHA inspection, the District Court of the Northern District of Georgia explicitly reached this conclusion eleven days after the court below rendered its opinion: *Usery vs. Centrif-Air Mach. Co.*, 424 F.Supp. 959 (N.D. Ga. 1977), appeal docketed, No. 77-1511, 5th Cir., voluntarily dismissed July 28, 1977.

[7] See *Alameida-Sanchez vs. U.S.*, 413 U.S. 266 (1973) (expressly reaffirming *Camara* and *See*); *Air Pollution Variance Bd. vs. Western Alfalfa Corp.*, 416 U.S. 861 (1974) (reaffirming *See* and *Camara* in express terms and in the context of administrative inspections conducted for purpose of promoting health and sanitation); and *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154, (E.D. Tex. 1976) (three-judge court). The Court relied heavily on the well-reasoned opinion by G. Gee, Circuit Judge, which reviewed and determined the meaning and constitutionality of the inspection provisions set forth in § 8(a) of OSHA from the vantage point of the instruction provided by *Alameida-Sanchez* and *Western Alfalfa*).

cases.' We have no such industry in this case. OSHA applies to all businesses that affect interstate commerce. 29 U.S.C. § 651 (a) (3). As such, it applies to a wide variety of over six million work places and does not focus on one particular type of business or industry. It cannot be questioned that this broad spectrum of businesses can be distinguished from the heavily regulated liquor and firearm industries encountered in *Colonnade* and *Biswell, supra.*" J.S. App. A 7a.

The court below found that the warrantless inspection provisions of OSHA were controlled by the *Camara* and *See* cases. In holding that non-consensual, warrantless searches of business premises under OSHA were repugnant to the Fourth Amendment, the court below adopted the reasoning of *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F. Supp. 154 (E.D. Tex. 1976), with the major exception that it did not follow the case in sustaining the constitutionality of Section 8(a) of the Act:

> "While we adopt, in general, the similar reasoning employed there, we decline the invitation to judicially redraft an enactment of Congress. Unlike the *Gibson's Products* court, we cannot accept the proposition that the language of the OSHA inspection provisions envision the requirement that a warrant be obtained before any inspection is undertaken. Certainly, Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, the procedures under which it is to be obtained, and other necessary regulations. Congress did not do so and we refuse to accept that duty." J.S. App. A 9a-10a.

Leaving aside for the moment the question of whether Section 8(a) of the Act is unconstitutional and void on its face[9], it is clear that the court below and the court in *Gibson* found the inspection provisions of the Act violative of the Fourth Amendment of the Constitution at least to the extent that such provisions purported to authorize warrantless inspections.[9] In concluding this review of the decision below, Appellee draws the Court's attention to the great wave of almost unanimous judicial opinion that has been expressed by both federal and state courts across the land in condemning warrantless inspections under Section 8(a) of the Act as violative of the provisions of the Fourth Amendment to the United States Constitution.[10] In reading these

[9] The issue of whether the act is void on its face is discussed in part IV.
[9] *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154 at 407; (E.D. Tex. 1976) *Cf., Empire Steel Mfg. Co. vs. Marshall*, Civil No. 77-48-BLG (D. Mont., September 1, 1977).
[10] Decisions finding warrantless inspections purportedly conducted under Section 8(a) of the Act to be unconstitutional:
Empire Steel Mfg. Co. vs. Marshall, Civil No. 77-48-BLG (D. Mont., Sept. 1, 1977). *Marshall vs. Shellcast Corp.*, Civil No. 77-P-0995-E (N.D. Ala., August 10, 1977); *Usery vs. Centrif-Air Mach. Co.*, 424 F.Supp. 959 (N.D. Ga. 1977)), *appeal docketed*, No. 77-1511, 5th Cir., *voluntarily dismissed* July 28, 1977; *Re: Work Site Inspection of Alfred Calcagni & Sons*, Civil No. 77-0046M (D. Rhode Is., June 28, 1977); *Dunlop vs. Hertzler Ent., Inc.*, 418 F.Supp. 627 (D. N.Mex. 1976) (three-judge court), *appeal docketed* No. 76-2020, 10th Cir.; *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154 (E.D. Tex. 1976) (three-judge court), *appeal docketed*, No. 76-1526, 5th Cir.; *Usery vs. Rupp Forge Co.*, Civil No. C-76-385 (N.D. Ohio, April 22, 1976), *appeal docketed*, No. 76-1960, 6th Cir.; *Yocom vs. Burnette Tractor Co., Inc.*, Case No. CA-336-MR (Ct. App. Ky., May 27, 1977), CCH OSHD ¶ 21, 851.
Opinions finding § 8(a) of the Act or its state counterpart unconstitutional for mandating warrantless inspections of private premises:
Marshall vs. Great Lakes Dredge & Dock Co., Civil No. Misc. (S.D. Cal., July 20, 1977) (order compelling warrantless inspection denied, motion to dismiss granted); *Barlow's, Inc. vs. Usery*, 424 F.Supp. 437 (D. Idaho 1976). *prob. juris. noted, sub nom. Marshall vs. Barlow's, Inc.*, ... U.S. ....., 97 S.Ct. 1642 (April 18, 1977); *Weyerhaeuser Co. vs. Reizen*, Civil No. 771652 (E.D. Mich., filed May 2, 1977) (*dictum*, court held that Michigan state statute might constitutionally provide for issuance of search warrant upon showing of probable cause, the federal statute, unconstitutionally, did not); *Woods, & Rhode, Inc. vs. Alaska*, 565 P.2d 138 (Alaska 1977) (based on Alaska Const. Art. I, §§ 14 and 22); *Alaska vs. General Home Repair & Roofing*, Civil No. 76-1651 (3rd Dist. Alaska, February ....., 1977) (based on U.S. Const., Fourth Amend. and Alaska Const. Art. I § 14), 6 BNA Occu-

opinions, it becomes readily apparent that the judicial criticism of the warrantless inspections under Section 8(a) of the Act is deeply felt by the judges.[11] Many of these well-reasoned decisions refer at length to the historical and constitutional roots in mustering support for the condemnation of OSHA's modern "general warrants."[12]

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pational Safety & Health Reporter 948; *Calif. vs. Melvin Salwasser*, Case No. F-24271 (Fresno, Cal. Mun. Ct., March 24, 1977), CCH OSHD § 21, 797; *Epstein vs. Fitzwater*, Civil No. 6838EQ (Cir. Ct. Garrett Cnty., Md., September 2, 1976), 6 BNA Occupational Safety & Health Reporter 948; *New Mex. Environ. Improve. Agency vs. Albuquerque Publish. Co.*, Civil No. 9-76-04397 (2nd Dist. N.Mex., January 20, 1977), CCH OSHD § 21,513; *Oregon vs. Keith R. Foster*, Civil No. 5943 (Cir. Ct. Jefferson Cnty., Ore., November 1, 1976), CCH OSHD § 21,255; *Baird vs. Utah*, Civil No. 237878 (3rd Dist. Utah, January 9, 1977), CCH OSHD § 21,523.

CONTRA: The following three opinions declared that warrantless inspections conducted pursuant to § 8(a) of the Act were constitutional. However, one of the opinions has been overruled, and the subject proposition in another of these opinions was *dictum*:

Usery vs. N.W. Orient Airlines, Civil No. 76-C-2177 (E.D. N.Y., June 10, 1977) (dictum); *Dunlop vs. Able Contractors*, Civil No. 75-57-BLG (D. Mont., December 15, 1975) (court's position reversed in *Empire Steel Mfg. Co. vs. Marshall, supra)*; and *Brennan vs. Buckeye Ind.*, 374 F.Supp. 1350 (S.D. Ga. 1974).

It is noteworthy that the one remaining opinion in point, *Brennan vs. Buckeye Ind., Inc.*, was rendered without the benefit of this Court's opinions in *Almeida-Sanchez vs. U.S.*, 413 U.S. 266 (1973); and *Air Pollution Variance Bd. vs. Western Alfalfa Corp.*, 416 U.S. 861 (1974), as was carefully pointed out by the Court in *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp 154 at 160-161 (1976).

[11]Prior to the *Gibson* case and ruling without the benefit of this Court's decisions in *Almeida-Sanchez* and *Western Alfalfa*, Judge Batten reluctantly granted OSHA's petition to make a warrantless inspection of a contractor's work site in *Dunlop vs. Able Contractors*, Civil No. 75-57-BLG (D. Mont., December 15, 1975), with the following comment:

"This decision is regrettable; I find the Occupational Safety and Health Administration and its position in this case to be very distasteful."

Subsequently, Judge Batten has had the opportunity to overrule this decision in *Empire Steel Mfg. vs. Marshall*, supra.

[12]In *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. at 158, the court decided that OSHA compliance officers have been invested "with something very like a general warrant."

The court below in footnote 4 at J.S. App. 7a-8a stated:

"We of course, do not sit in judgment of the wisdom of Congress. Our only concern is the alleged affront to the Fourth Amendment. The rationale of the anonymous saying 'expediency is the argument of tyrants, it precedes the loss of every human liberty' seems of forceful application here. That the end result may be laudable and desirable does not justify the means used to accomplish it when constitutional prohibitions are confronted. To paraphrase Burke, *Impeachment of Warren Hastings*, February 16, 1788; 'The constitution (law) and arbitrary power are in eternal omnity.'"

II

THE PRIVACY INTERESTS PROTECTED BY THE FOURTH AMENDMENT WOULD BE VIOLATED BY WARRANTLESS OSHA INSPECTIONS.

As pointed out above, there has developed a near consensus among the courts in both state and federal jurisdictions that non-consensual OSHA inspections must be conducted within a warrant framework.[13] The wellspring of authority subjecting OSHA inspections to warrant requirements is the decision in *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154 (E.D. Tex. 1976). In determining the meaning and constitutionality of the inspection provisions set forth in Section 8(a) of the Act, the three-judge panel unanimously held:

> "These authorities and others cited below convince us that facially the inspection provisions of OSHA amount to just such an attempt at a broad partial repeal of the Fourth Amendment as is beyond the powers of Congress.
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> • • •
>
> "We deal, as is the rule in such cases, with a clash of near absolutes. On the one hand we have the Fourth Amendment, a safeguard to ordered liberty indispensable and, historically at least, preeminent. On the other stands the congressional enactment, clearly subject to the interpretation that diminishing the injuries, and consequent loss of suffering, caused by hazardous working conditions justifies investing

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[13]See footnote 10.

OSHA compliance officers with something very like a perpetual general warrant.

• • •

"OSHA's sweep is broad, and Congress' findings supporting it are slender. Made subject to its warrantless inspection is every private concern engaged in a business affecting commerce which has employees and all 'environments' where these employees work. It thus embraces indiscriminately steel mills, automobile plants, fishing boats, farms and private schools, commercial art studios, accounting offices, and barbershops—indeed, the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States." 407 F. Supp. at 157, 158 and 161.

As is the case with Barlow's the court noted that *Gibson* (unlike the circumstances in *Colonnade* and *Biswell*) was not licensed, that it had no history of close regulation, and that there was no "reason whatever" to believe hazardous working conditions prevailed in the area sought to be searched. Again referring to the nature of the contemplated search by the OSHA inspectors, the court observed:

"Instead, we contemplate a roving commission in the vein of those considered in *Camara*, *See* and *Alameida-Sanchez*, exercised by these compliance officers in their unfettered discretion. No emergency existed, and no functional or general equivalent of probable cause, such as *Camara* envisions is shown. This warrantless search would not comply with Fourth Amendment standards and cannot be countenanced." 407 F. Supp. at 162.

The Secretary challenges the proposition that warrantless inspections authorized under Section 8(a) of the Act are incompatible with the Fourth Amendment's guarantee against unreasonable searches and seizures. The government contends "that the safeguards contained in the act for the conduct of such inspections are sufficient to meet Fourth Amendment requirements in light of the limited nature of the employer's privacy interest in the portions of his premises routinely occupied by his employees." Brief for the Appellants, 19. Before the Secretary's position in this respect is analysed, the nature of the employers' privacy interest in these circumstances should be considered.

A. *The Nature of the Privacy Interests Protected:*

Insight into the nature of these privacy interests protected by warrant procedures is to be gained by reference to the history of the Fourth Amendment. As stated by this Court in *Warden vs. Hayden*, 387 U.S. 294, 301 (1967), "we have examined on many occasions the history and purposes of the amendment. It was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of 'the sanctity of a man's home and the privacies of life,' *Boyd vs. U.S.*, 116 U.S. 616, 630, 29 L.Ed. 746, 751, 6 S.Ct. 524, from searches under indiscriminate, general authority." That this historical evaluation continues was recently noted in *U.S. vs. Chadwick*, 45 U.S.L.W. 4797, 4799 (U.S. June 21, 1977), where the Court reaffirmed that "it cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of as-

sistance . . . (which) granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." The uniqueness of the Fourth Amendment in the history of American constitutional development has been succinctly set forth in a work frequently referred to by this Court:

> "Guarantees such as trial by jury, the privilege against forced incrimination, and that against double jeopardy were hallowed by the centuries; as part of the common law of England they became as firmly established in the American Colonies as in the mother country itself. To understand why they were sufficiently prized to be placed in the Constitution, one must study English, rather than American, history. Such, however, is not the case with the Fourth Amendment. Alone among those constitutional provisions which set standards of fair conduct for the apprehension and trial of accused persons, the Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.
> * * *
>
> "The Fourth Amendment was not a construct based on abstract considerations of political theory, but was drafted by the framers for the express purpose of providing enforceable safeguards against a recurrence of high-handed search measures which Americans, as well as the people of England, had recently experienced. These abuses, which in the

> American Colonies took place largely in the fifteen years before the American Revolution and which extended over a much longer period of time in England, had done violence to the ancient maxim that 'a man's home is his castle.' It was to guard against a repetition of these experiences that six of the newly independent states almost immediately wrote into their own constitutions provisions akin to those of the Fourth Amendment. The antecedent history of the Fourth Amendment, therefore, has two principal sources; the English and American experiences of virtually unrestrained and judicially unsupervised searches, and the action that had already been taken by some of the states to guard constitutionally against a recurrence of this abuse. From these tributaries flowed the Fourth Amendment."[14]

It is precisely because of the threat of recurrence on a massive scale of such high-handed, judicially unsupervised search measures in the present day that the history of the Fourth Amendment as the national remedy to, and safeguard against, unwarranted governmental intrusion must be carefully reviewed. As noted above, this Court has indicated its frequent review of, and its intimate familiarity with, the development of this history. Nevertheless, some comments might be in order. At the outset, it is clear that the protections of the Fourth Amendment are anti-governmental; i.e., they protect against governmental, as opposed to private, intrusions.[15] As stated by this Court

[14]Landynski, SEARCH AND SEIZURE AND THE SUPREME COURT, the John Hopkins Press, 1966, 19-20 (hereinafter referred to as "Landynski"). This work has been referred to in many of this Court's cases and most recently in *G. M. Leasing Corp. vs. U.S.*, 429 U.S. 338, 355 n. 19 (1977).
[15]History makes it clear that the searches to be controlled were those to be carried out under public authority in the name of the law, and not

in *Camara vs. Municipal Ct.*, 387 U.S. 523, 528, "The basic purpose of this amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."

Next, it is proper to be reminded that, although the Fourth Amendment was drafted by the first Congress and followed a legislative precedent set by the Virginia Bill of Rights of 1776,[16] it was a *judicial* doctrine, fought for and preserved almost single-handedly by the American colonial judges.[17] The eloquence of James Otis, Jr., in his argument in opposition to the petition of T. Lechmere in 1761 as recorded by John Adams, has become well known[18] and has often been improperly cited as evidence for popular discontent against writs of assistance.[19] In fact, the battle against the writs of assistance as general warrants was not of a popular nature, but rather of an unheralded, but intense, legal confrontation between American judges and the English executive throughout the Colonies.[20] As pointed

those made by private persons not acting under the color of law. Landynski, 44.

[16]Landynski, 37-42; THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, John Hopkins University Studies in Historical and Political Science, Series 55, No. 2, 1937, 79; See, generally, *The Bill of Rights, A Documentary History*, B. Schwartz, Ed., 1971.

[17]O. M. Dickerson, *"Writs of Assistance as a Cause of the Revolution,"* in THE ERA OF THE AMERICAN REVOLUTION, Richard B. Morris, Ed. 1939 (First Harper Torchbook Ed., 1965) 40-75 (hereinafter referred to as "Dickerson, 'Writs of Assistance' "). This essay by O. M. Dickerson, referred to as "an able study" by Landynski, p. 31, footnote 51, and p. 36, footnote 84, more than any other reviewed, accurately describes the facts underlying the American concern with general warrants and the necessity of a separate judiciary.

[18]Adams, *Life and Works of John Adams*, Vol. X, 276.

[19]Dickerson, "Writs of Assistance." See, also Landynski, 36.

[20]Dickerson, "Writs of Assistance", 47-49. O. M. Dickerson provides us at 73-75 with a memorable summary of this confrontation, which has particular application in the present case in light of the Secretary's position that judicial supervision should be excluded from OSHA administrative searches:

"It took courage for judges to refuse writs of assistance when demand-

out by O. M. Dickerson,[21] the lawyers and judges in the American Colonies were familiar solely with the practices of the courts of the common law. Search warrants were issued in the common law courts only on specific information, supported by oath or affirmation, and returnable to the court of issue. Therefore, when American judges and lawyers were confronted with a form for a writ of a general nature prepared by the customs officers and as used by the Exchequer Court in England, they could not avoid the conclusion that this was a new device of the executive and entirely unsupported by law.

This history establishes the fact that the provisions

ed by the customs officers, since they held their commissions at the will of the Crown and were dependent for their salaries upon the revenues collected by the custom commissioners. Detailed reports were required of the custom officers as to the success of every application to a court or to a judge for writs. In no other case were courts watched so narrowly. Abstracts of court records were demanded and received. Private conversation was recorded at once in writing. Thus every attorney general and every judge knew that his rulings and opinions would be reported directly to the customs commissioners. They must also have known that any reported failure on their part to cooperate with customs officers would be transmitted to England. They faced the possibility that they might at any time be deprived of their positions by royal order and have their pay reduced or stopped entirely. They must have also known that compliance on their part might be rewarded by preferment and possibly by increases in salary. It does not seem improbable that such possibilities were presented to them orally, although no written records verifying this assumption have come to light. In the face of such formidable pressure from official sources, it is surprising that the judiciary from Connecticut to Florida, with one exception, stood firm in opposing the legality of the particular form of writ demanded of them and continued in their judicial obstinacy through six years of nearly constant efforts to force them to yield.

* * *

"... The evidence indicates that the outbreak of the Revolutionary War alone averted efforts to secure judicial changes that would have forced American judges to comply with the official British interpretation of law. The efforts to overrule the judges in Virginia have already been commented upon. The persistence and tenacity with which the commissioners of customs pursued their campaign for general writs indicate their determination to see the matter through, even though it required changes in the judicial system. In this they were not acting on their own initiative, but were under constant pressure from England. The American determination to keep the courts free from executive control rose in no small degree out of this experience."

[21]*Ibid.*, 47-48.

of the Fourth Amendment are directed against the government, more particularly the executive; that they are directed against unreasonable intrusion by the government; that these provisions have been judicially developed and fashioned; and that these provisions are precedural safeguards for determining the reasonableness of a search which requires judicial supervision. The warrant procedure is a judicial institution to check the executive.

Our history teaches us that the instrument of this intrusion, the general warrant which became synonymous with the writ of assistance in the Colonies,[22] was applied principally to suppress the smuggling that resulted from the enforcement of the mercantile system in 1760 following the French and Indian Wars.[23] Since the smuggling was not by any means confined to homes, the writs of assistance were the instruments of intrusion into all sorts of houses, buildings and containers. The acts of 1664, 13 and 14 Car. II, C. 11, Cl. 5, were made applicable to the Colonies through the Act of 1696, 7 and 8 Wm. III, authorizing any person with a writ of assistance "in the daytime to enter, and go into any house, shop, cellar, warehouse, room, or other place . . ."[24] The authority vested in customs officials was expressly stated in their commissions, which empowered them, with writs of assistance, to "enter into any house, shop, cellar, warehouse or other place whatsoever not only within said port but within any other port or places within our jurisdiction there to make diligent search . . . ."[25]

[22]Landynski, 30-32; Dickerson, "Writs of Assistance", 43-47.
[23]Landynski, 30.
[24]Dickerson, "Writs of Assistance", 44.
[25]Dickerson, "Writs of Assistance", 45; e.g., the writ of assistance issued

As the procedural safeguard expressly developed against governmental intrusion, the Fourth Amendment necessarily afforded a scope of protection as broad as the scope of the abuse inflicted by the writs of assistance. Hence, our history clearly demonstrates that the Fourth Amendment is not confined to protecting privacy interests in homes, but extends to all "houses", warehouses, buildings, shops, cellars, rooms and other places. *U.S. vs. Chadwick*, 45 U.S.L.W. at 4799. Commercial houses and places of trade were obviously primarily contemplated in this context, since the surreptitous commercial trade or smuggling of the colonists was the principal target of writs of assistance.[26] Therefore, proper historical interpretation of the Fourth Amendment inescapably leads to the conclusion that privacy interests in the context of private enterprises, private property, private domain, business, and commerce, as well as privacies of the home, are protected by its provisions. *U.S. vs. Chadwick*, *supra* at 4799, 4800.

Despite this historical record, the Secretary takes the position that this Court's decisions in *Camara* and *See* do not control in this case. Brief for the Appellants, 14, 22-33. The Secretary seeks to limit the holding in these cases to certain narrow factual aspects found in each. Since *Camara* involved the attempted search of a

to Charles Paxton, surveyor of the Port of Boston, on December 2, 1761, against the issuance of which James Otis had argued, was equally broad and authorized him to enter "into any house, shop, cellar, warehouse or room or other place" in search of prohibited goods. See *Documentary Soures Book of American History, 1606-1926*, edited by William McDonald, 1926, 105-108, for the full text.
[26]Although Barlow's agrees with the Court's reasoning in *U.S. vs. Chadwick*, *supra* at 4799, that "it would be a mistake to conclude, as the government contends, that the warrant clause was therefore intended to guard only against intrusions into the home," it is submitted that the essay of O. M. Dickerson, referred to above, overcomes the "silence in the historical records" referred to by the Court.

personal residence, the Secretary claims that holding to be limited to protecting "a core privacy interest" confined to the privacies of a dwelling. Brief for the Appellants, 14, 32. Likewise, the Secretary claims that this Court's holding in *See*, involving a commercial warehouse, should be limited to these factual aspects: " '[T]he warehouse . . . (was) maintained as locked premises and . . . (was) inaccessible to anyone except the defendant' (408 P. 2d at 263)." Brief for the Appellants, 14, 32.

Barlow's submits that the constitutional protections forged on the anvil of American history include privacy interests associated with private property and domain and are not limited to the "core interests" of home and office as contended by the Secretary. The historical record compels the conclusion that the "governing principle" of *Camara* as applied in *See* supports the general application of the holding in the latter that "the businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See vs. City of Seattle*, 387 U.S. at 543. In other words, the legitimate privacy interests of the businessman include the expectation that all of his private commercial property shall be free from warrantless government intrusion.

A careful reading of the decision in *See* makes manifest this Court's intent to rule on the broad issue of whether the holding in *Camara* applies generally to warrantless official entries upon private commercial property. Following a discussion of the rapid growth of governmental regulation and the regulation technique of official entry on commercial property, the

Court noted that it "has not had occasion to consider the Fourth Amendment's relation to this broad range of investigations" 387 U.S. at 554. Referring to the comprehensive variety of fact situations in the considerable number of cases dealing with the Fourth Amendment issues raised by the administrative subpoena of corporate books and records, the Court found "strong support in these subpoena cases for our conclusion that warrants are a necessary and tolerable limitation on the right to enter upon and inspect commercial premies." 387 U.S. at 544. Equally comprehensively, the Court held:

> "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.
> "We hold only that the basic component of a reasonable search under the Fourth Amendment—that it not be enforced without a suitable warrant procedure—*is applicable in this context, as in others*, to business as well as to residential premises." (Emphasis supplied)[11]

In *U.S. vs. Chadwick, supra*, this Court criticized the government's "core interest" approach in its contention that "the Fourth Amendment warrant clause protects only interests traditionally identified with the "home" and "other specifically designated locales". 45 U.S.L.W. 4798, 4799. It would appear that the Secre-

[11] *See vs. City of Seattle*, 387 U.S. 545, 546. The "case by case" consideration proposed by the Court was limited to the issue of determining exceptions to the general commercial rule in instances of licensed or heavily regulated businesses. *Id.* at 546.

tary attempts to limit privacy interests to a "core" interest based on the concept of personal privacy or solitude. According to the Secretary, an employer's only legitimate expectation of privacy is limited to "his home, office or person." Brief for the Appellants, 31. As indicated above, the historical development of the Fourth Amendment and this Court's cases clearly indicate that a most comprehensive variety of privacy interests are protected from governmental intrusion by the safeguards of the Fourth Amendment. Clearly, legitimate expectations of privacy, in the sense of protected privacy interests, include those interests related to the use and enjoyment of "private" property in circumstances not necessarily restricted to solitude. *Accord, G.M. Leasing Corp. vs. U.S.*, 429 U.S. 338, 352-359 (1977), reaffirming and applying in a commercial, corporate context the holding of *Camara* that "except in certain carefully defined classes of cases" the privacy interests in private property must be safeguarded against governmental intrusion by a valid search warrant procedure.

The Secretary's application of a "limited privacy interest" theory to this case is not helped by reference to the authority of automobile search cases. This Court's recent decision in *South Dakota vs. Opperman*, 428 U.S. 364 (1976), sets forth a 'well settled," "two fold" distinction between the search of an automobile and the search of a home or office:

> "First, the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible . . . beside the element of

> mobility . . . the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office . . . automobiles, unlike homes, are subject to pervasive and continuing government regulations and controls, including periodic inspection and licensing requirements." 428 U.S. at 368.

The distinction between automobile searches and administrative searches for health and safety reasons, such as those involved in *Camara* and *See*, were readily distinguished by the Court. 428 U.S. at 467, n. 2.

Of paramount importance is the fact that in no case involving the search of a private premises has this Court recognized existence of a "limited privacy interest" that has been outweighed in the balance by governmental interest to inspect. The application of the "reasonable expectation of privacy" doctrine developed in *Katz vs. U.S.*, 389 U.S. 347 (1967), served to expand the scope of Fourth Amendment protections available to privacy interests rather than to contract them as the government's balancing theory would do. Accordingly, this Court in *Katz* expressly disapproved of the physical trespass theory of governmental intrusion relied upon in *Olmstead vs. U.S.*, 277 U.S. 438 (1928), and its progeny and extended the need for judicial supervision of the scope of a search to "wherever a man may be." *Katz vs. U.S.*, 389 U.S. at 359.

Likewise, the doctrine of the *Katz* case refutes the Secretary's contention that Barlow's privacy interests in the enclosed, non-public work areas of its premises is "effectively diminished" by the "routine occupation by the owner's employees and infrequent visits by

those outside parties who deliver materials for the conduct of the enterprise . . .—especially *vis a vis* inspectors whose mission is to ensure the health and safety of the very employees whom the owner has assigned for his profit to the areas at issue." Brief for the Appellants, 29. The Secretary claims that Barlow's "privacy" (as distinguished from "privacy interests") is diminished by the presence of the work force on the premises. In language applicable to the Secretary's contention, this Court in *Katz* declared:

> "We decline to adopt this formulation of issues. In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.' Secondly, the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' *That amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.* Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states." (Emphasis supplied)
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> • • •
>
> "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. (cases cited) But what he seeks to preserve as private, even in an area

> accessible to the public, may be constitutionally protected. (cases cited)" *Katz vs. U.S.*, 389 U.S. at 350-352.

Hence, the Secretary's reliance on "privacy," in the sense of personal privacy, solitude or confidentiality (as distinguished from "privacy interests") as a criterion for invoking the Fourth Amendment protections is faulty. The term "privacy interests" (also referred to as "privacy" in many decisions, e.g. *Chadwick, supra* at 4799, 4800) is not descriptive of any type or degree of personal privacy in the sense of solitude, confidentiality or the right to be let alone. But rather it is descriptive of the right of the people to be secure from unreasonable governmental intrusion and in the exercise of the safeguards of the Fourth Amendment. These privacy interests must always be set in the context of individual or corporate rights; i.e., personal privacy, property rights, and such, in order to have meaning."[28] The protection of these privacy interests was again very recently affirmed in the *Chadwick* case:

> "[These cases] also reflect this settled constitutional principle, discussed earlier, that a fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, and not

[28] "[I]t is plain that to a large extent one's important interests—the elements of one's legal identity—are created or defined by the state, through its property, contract, or agency law. Attempts to define 'privacy' without reference to such terms have not been successful in any of the situations in which that has been attempted. It may be that privacy, like happiness, cannot be talked about directly but only through the use of other, subsidiary, languages." James B. White, *The Fourth Amendment as a Way of Talking about People: A Study of Robinson and Matlock*, in THE SUPREME COURT REVIEW, 218 (Philip B. Kurland, ed. 1974).

simply those interests found inside the four walls of the home." *U.S. vs. Chadwick, supra* at 4800.

As applied to Barlow's, then, the fact that employees are present in the enclosed work areas of the business premises is irrelevant. Obviously, there is less personal privacy extant under such circumstances. Significantly, however, Barlow's work area is *non-public*, and, as such, Barlow's has a legitimate privacy interest to be protected against warrantless, governmental intrusion in those enclosed work areas. *Camara*, 387 U.S. at 529-530; and *See vs. City of Seattle*, 387 U.S. at 543.

Likewise, the doctrine of relinquishment of privacy interests discussed in *Marsh vs. Alabama*, 326 U.S. 501 (1945), is inapposite. The Secretary and the *amicus* A.F.L-C.I.O. contend that by opening its business premises to employees, Barlow's relinquishes its privacy interests in the Fourth Amendment safeguards. Brief for the Appellants, 29-30; and Brief for the A.F.L.-C.I.O., as *amicus curiae*, 10-12. The fact situation in the *Marsh* case can be readily distinguished from that in *Barlow's* in that the company-owned town in *Marsh* assumed many public community functions, thereby acquiring sufficient duties to the public to cause it to be subjected to public control. 326 U.S. at 502. Barlow's has taken on no public functions of the sort spoken to in *Marsh*. Neither the Secretary nor the A.F.L.-C.I.O. present any authority sustaining their theory that the mere presence of employees regularly engaged on the premises in the employ of the owner constitutes such a relinquishment of control as was evident in *Marsh*. Furthermore, and perhaps most significantly, the constitutional issue in *Marsh* dealt with

First Amendment rights and the body of law thereappertaining. The analogy drawn by the A.F.L.-C.I.O. between Barlow's work areas and common areas of residential rental properties is also inapposite, because Barlow's employees have nothing approaching a leasehold interest in any way related to Barlow's premises.

The Secretary does not contend that the business premises of Barlow's are not protected by the Fourth Amendment for the reason that Barlow's is a corporation. Such a proposition could not be defended in light of this Court's clear holdings to the contrary. *G. M. Leasing Corp. vs. U.S.*, 429 U.S. 338 (1977); *See vs. City of Seattle*, 387 U.S. 541 (1967); *Oklahoma Press Publish. Co. vs. Walling*, 327 U.S. 186, 205-206 (1946); *Go-Bart Co. vs. U.S.*, 282 U.S. 334 (1931); *Silverthrone Lmbr. Co. vs. U.S.*, 251 U.S. 385 (1920); and *Hale vs. Henkel*, 201 U.S. 43, 75-76 (1906). *Cf.*, *Cal. Bankers Assn. vs. Schultz*, 416 U.S. 21 (1974).

In summary, the history of the Fourth Amendment and the decisions of this Court interpreting that history establish that the privacy interests protected by the Fourth Amendment include the right of corporations to maintain their commercial, non-public work areas free of unwarranted governmental intrusion, except in certain carefully defined classes of cases. The Secretary to the contrary, this Court has not recognized any "limited" privacy interest as applied to private premises inspections. The privacy interest exists, as such, and is protected by the safeguards of the Fourth Amendment. This Court has not viewed these privacy interests as being diminished, lessened or limited by reasonable search based on a valid warrant or by warrantless searches made under exigent cir-

cumstances or in other certain carefully defined classes of cases. *Camara vs. Municipal Ct.*, 387 U.S. at 528-529, 533.

B. *Governmental Interests in Effectuation of the Purposes of OSHA Do Not Justify the Creation of a Broad New Area of Administrative Inspection Activity Free of Fourth Amendment Warrant Requirements.*

The Secretary has developed his argument for warrantless OSHA inspections in the context of balancing a "limited" or "diminished" privacy interest in the employer against the convenience of the inspection procedures and the governmental interest in conducting the inspections. Brief for the Appellants, 26-31. Although, as shown above, a concept of "limited" privacy interest is inapplicable in this case and the balancing theory proposal by the Secretary has been rejected by this Court, the government's interest and the inspection procedures must be considered in order to determine whether warrantless OSHA inspections are reasonable in the context of this Court's holdings in *Colonnade Catering Corp. vs. U.S.*, 379 U.S. 72 (1970), and *U.S. vs. Biswell*, 406 U.S. 311 (1972).

The absolute privacy interests safeguarded by the Fourth Amendment are, by its terms, subject to reasonable governmental search. As explained in *Camara*, the question is not a matter of balancing these privacy interests against the interests of the government to search, rather it is a question of the reasonableness of the search. *Camara* reaffirmed the "governing principle" that, except for a carefully defined class of cases, all such searches into privacy interests are "unreasonable" unless authorized by search warrant. 387 U.S.

at 529, 530. The issue here, then, is not whether there is probable cause to issue a search warrant, but whether OSHA inspections can be conducted without search warrants. In determining whether OSHA inspections fall into the narrow class of cases excepted from the warrant requirement, we are advised by *Camara* that the question is whether the burden of obtaining a warrant is likely to frustrate the government's purpose behind the search. It is submitted that this Court has decided that the only relevant civil purposes recognized as not subject to such material frustration by the warrant procedure are those described in *Colonnade* and *Biswell* as delimited by the decisions of *Almeida-Sanchez* and *Western Alfalfa:* those associated with licensing and pervasive regulation by government.

In *Colonnade* the Court considered the issue of the constitutionality of a statute providing for warrantless inspections of federally licensed dealers in alcoholic beverages. With reference to its decision in *See* that it had "reserved a decision on the problems of licensing programs requiring inspection," 379 U.S. at 77, the Court allowed warrantless inspections because of the long history of government licensing and pervasive regulation of liquor traffic. In *Biswell* the Court dealt with the issue of the warrantless inspection of a federally licensed firearms dealer. Following the rationale in *Colonnade*, the Court held the rationale requiring warrants in *See* inapplicable, finding that "when a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection." 406 U.S. at 316.

This Court has on two subsequent occasions construed its holdings in *Colonnade* and *Biswell* and found the exceptions to the rule in *Camara* and *See* to be limited to governmentally licensed and pervasively regulated enterprises. In *Almeida-Sanchez vs. U.S.*, 413 U.S. 266 (1977), the Court faced the issue of whether the border patrol could search the petitioner's car without a warrant. The government took the position that the search was an administrative inspection conducted pursuant to a valid statute, and therefore did not require a warrant. In rejecting the applicability of *Colonnade* and *Biswell*, the Court stated:

"Two other administrative inspection cases relied upon by the government are equally inapposite. *(Colonnade* and *Biswell)* Both approved warrantless inspections of commercial enterprises engaged in business closely regulated and licensed by government.

* * *

"A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him. As the Court stated in *Biswell:*

" 'It is also plain that inspections for compliance with the gun control act pose only limited threats to the dealers' justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license,

he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task.' *United States vs. Biswell. Id.*, at 316." 413 U.S. at 270, 271.

Very recently in *G.M. Leasing Corp. vs. U.S.*, 429 U.S. 338 (1977), this Court rejected the contention of the I.R.S. that its power to lay and collect taxes constituted a broad exception to the Fourth Amendment safeguards against warrantless intrusion. The I.R.S. claimed that its vast tax collection effort subjected all businesses to its regulation thereby justifying warrantless searches on the rationale of *Biswell.* The Court rejected this argument:

"The respondents argue that warrantless searches are justified by congressional enactment, as were the searches in *Biswell* and *Colonnade.*" 429 U.S. at 356.

* * *

"The respondents argue that the interest in the collection of taxes is such as to bring this case within the reasoning of *Biswell* and *Colonnade. Those cases involved a voluntary participation in a highly regulated activity.*" (Emphasis supplied) 429 U.S. at 357.

"In the present case, however, the intrusion into petitioner's privacy was not *based on the nature of*

its business, its license, or any regulation of its activities." (Emphasis Supplied) 429 U.S. at 358.

• • •

"The intrusion into petitioner's office is therefore governed by the normal Fourth Amendment rule that 'except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.' *Camara v. Municipal Ct.*, 387 U.S. at 528-529." 429 U.S. at 358.

As is the case with the great majority of approximately five million businesses with their sixty million employees,[29] Barlow's is not licensed by the federal government, nor does it do any business in any pervasively regulated industry or enterprise. By footnote, the Secretary seeks to demonstarte that the need for the Act supports the government's interest in a warrantless inspection program by setting forth a number of disconnected statistics from the Senate hearings on the Act. Brief for the Appellants, 4-5, n. 2.[30] Reflecting OSHA's vast jurisdiction, these statistics are so general as to be almost meaningless in application to

[29]Robbins, *Truth and Rumor About OSHA*, 33 FED.B.J. 149, (1974); the Department of Labor defines small businesses as twenty-five or fewer employees. Of the approximately five million established businesses, 4.5 million are small businesses in this definition. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION'S IMPACT ON SMALL BUSINESS, OSHA Office of Policy Analysis, U.S. Department of Labor, July, 1976; see, also, comment *"OSHA vs. the Fourth Amendment: Should Search Warrants be Required for 'Spot Check' Inspection?"*, 29 BAYLOR LAW REVIEW 283, 1977; comment, *"Due Process and Employee Safety" Conflict in OSHA Enforcement Procedures."* YALE LAW JOURNAL, 1380, 1975.

[30]In addition to being suspect on their face, these statistics, as well as others marshaled to support the legislation in Congress have been extensively criticized as inaccurate and misleading as well as failing to demonstrate the efficacy of the Act. See generally, Robert Stewart Smith, THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ACHIEVEMENTS (1976); and Tim Engel, OSHA: AN OVERVIEW (1977).

the regulation of the operation of any particular business or type of businesses." There can be no argument that the goals of Congress in securing the health and safety of American employees are highly laudable. However, these general factual findings by Congress regarding the vast field of private business gave birth to OSHA and resulted in each employer being faced with the overwhelming legal presumption of his knowledge of over 4,400 OSHA standards covering 800 pages in the Code of Federal Regulations—with 2,100 of these standards applying to all industries and the remainder to construction and maritime industries[31] The general application of these OSHA standards further underscores the lack of genuine pervasive regulation by OSHA. There is very little in these regulations which applies or is related to the particular nature, problems, operation or activities of specific businesses or of types of businesses. Of persuasive application here is this Court's language in rejecting the claim of the I.R.S. to pervasive regulation that "the intrusion into petitioner's privacy was not based on the nature of its business, its license, or any regulation of its activities." *G.M. Leasing Corp. vs. U.S.*, 429 U.S. 338, 354.

[31]The basic problem with the implementation of the Act is that there is no fundamental agreement either on the Act's goals or on the practical methods of balancing considerations of greater safety and health against considerations of cost. Worse yet, there is no agreement among policy makers or lobbyists even on the framework that should be used for the discussion of these issues—primarily because safety and health are generally regarded as "goods" of inestimable, if not infinite, value. Robert Stewart Smith, THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ACHIEVEMENTS, 1976, 1. This study by Smith argues that the safety and health mandate of OSHA is inconsistent with the goal of promoting the general welfare. The study also demonstrates that the current program is likely to be ineffective in reducing injuries. See also, *Benefits and Costs of the Occupational Safety and Health Acts A Review of the Available Evidence*, Cong. Research Serv., Lib. of Cong. 1977, 17-19.

[32]Robert Stewart Smith, THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ACHIEVEMENTS, 1966, 11.

The breadth of the Act, the general application of its standards, and its provisions for specific enforcement create a great potential for serious abuse—a situation that cries out for strict application of the Fourth Amendment safeguards provided by valid search warrants issued by an independent judicial officer upon a showing of probable cause. We are reminded of Judge Gee's words in *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154, 161 (1976), "OSHA's sweep is broad, and Congress' findings supporting it are slender . . ." As pointed out by Judge Gee, the findings of Congress supporting OSHA may be contrasted with such detailed and specific findings as preface the Mine Safety Act, in which context warrantless inspections were upheld in *Youghiogheny & Ohio Coal Co. vs. Morton*, 364 F.Supp. 45 (1973). In *Youghiogheny* the Court recognized the basic rule of *Camara* and *See* and carefully adopted the exception accorded to pervasively regulated industries set out in *Colonnade* and *Biswell* and delimited in *Almeida-Sanchez*. The term "pervasively regulated" is not synonymous with being subject to "many" regulations. As the foregoing decisions show, "pervasive regulation" refers to the specific nature of a business or type of industry. The lack of pervasive regulation and the broad, general terms of the Utah OSHA Act have been heavily criticized by Judge Croft in *R. Lamar Baird vs. Utah*, Civil No. 237878 (3rd Dist. Utah, January 9, 1977), CCH OSHD § 21,523:

> "A 'workplace' is any place of employment (section 35-9-3(9)) and an 'employer' is any governmental entity, or company, or any person having one or more workmen or operatives regularly employed in

> the same business under any contract for hire (section 35-9-3(5)). The breadth of these definitions and the possibilities of unannounced, uninvited and compelled intrusions into the lives of all concerned staggers the imagination."

The Secretary and the *amicus* A.F.L.-C.I.O. take out of context the word "any" in a statement from *G. M. Leasing Corp.* in asserting that the doctrine of *Biswell* and *Colonnade* controls for the reason that an OSHA inspection of an employer's premises is "based on the nature of its business, its license or *any* regulation of its activities." (Emphasis supplied) As brought out above, the *G. M. Leasing Corp*, and *Almeida-Sanchez* cases clearly delimit the application of the Fourth Amendment exceptions allowed in *Colonnade* and *Biswell* to licensed and heavily regulated businesses where the licensing and regulation are directed to the nature of the business or industry, its activities, operation and problems. Reasoning by analogy cannot be stretched so far as to support the Secretary's contention that a general regulatory law such as OSHA, concerned with the health and safety of the nation's employees in their workplaces everywhere constitutes "pervasive" regulation of any particular business or place of employment as contemplated in *Biswell*.

If the legislative history of OSHA and its resultant statutory and regulatory provisions do not provide for a scheme of pervasive regulation of the businesses under its jurisdiction, then by what exception to the rule in *Camara* and *See* can the Secretary justify his claim of authorization for warrantless inspections? One of the exceptions reaffirmed in *Camara* was the

authorization of warrantless inspections in "emergency situations." 387 U.S. at 539. However, there is nothing in OSHA to indicate that its enforcement is based on such emergency or "exigent" circumstances. In *G. M. Leasing Corp.* the I.R.S. claimed that the imposition of warrant procedures on its tax levying authority would be an intolerable burden, for the reason that much of the property subject to seizure is removable. The Court rejected this argument and stated:

> "The statute simply does not focus on situations involving a need for rapid action . . . and we are unwilling to hold that the mere interest in the collection of taxes is sufficient to justify a statute declaring *per se* exempt from the warrant requirement every intrusion into privacy made in the furtherance of any tax seizure." 429 U.S. 338, 357-358.

OSHA by its own provisions recognizes that its routine spot inspections do not constitute emergency or "exigent" circumstances. Such circumstances of "imminent dangers" to safety and health are particularly defined and subjected to procedures distinct from the routine random or "general schedule" investigation. 29 USC § 662.[33] Hence, the provisions of Section 8(a) of the Act simply do not focus on emergency situations.

Likewise, administrative efficiency or "inconvenience

[33]Imminent dangers" are defined as "any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this chapter." 29 U.S.C. § 662(a). It is interesting to note that under such emergency situations the statute provides for judicial involvement in the form of injunctive relief and restraining orders against imminent dangers. *Id.*, § 662(a) & (d). Also to be noted is the provision by regulation for an exception to the prohibition against giving advance notice of inspection in cases of "apparent imminent danger." 29 C.F.R. 1903.6.

alone has never been thought to be an adequate reason for abrogating the warrant requirement." *Almeida-Sanchez vs. U.S., supra* (Powell, J., concurring at 283). Hence, warrantless inspections should not be allowed on the Secretary's claim for need of rapid action or surprise "in view of the ease in which hazardous working conditions might be temporarily concealed or ameliorated." Brief for the Appellants, 20. The need of the government to inspect in order to insure the efficacy of its programs has never been found to be a controlling factor by this Court. *Camara*, 387 U.S. at 533; *G. M. Leasing Corp.*, 429 U.S. at 354-356; *Almeida-Sanchez*, 413 U.S. at 273.

The Secretary and several *amici* contend that the statutory and procedural safeguards of the Act limit the possibilities of abuse of employer's privacy interests to such a degree that individualized, independent judicial supervision is no longer necessary for the routine OSHA inspection. Brief for Appellants, 34-37. This astounding proposition ignores the classic Platonic question: Who will regulate the regulators, The statutory provisions limiting inspections to "regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner" and so on, are not self-applying—but involve the conduct of and interpretation by inspectors. To this the Secretary answers that the discretionary decisions made in the application of the statutory inspection provisions to a particular business are made by the area supervisors, thereby abrogating any function for a magistrate to perform in an OSHA inspection. Brief for the Appellants, 35, 44-45. Obviously, such provision does not meet the standards of the Fourth Amendment for in-

dependent judicial supervision over entry into private premises. Of particular application to the Secretary's position in this regard is Justice Jackson's statement:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson vs. U.S.*, 333 U.S. 10, 13-14 (1948).

Likewise, this same proposition was answered in *Camara:*

> ". . . Broad statutory safeguards are no substitute for individualized review." 387 U.S. at 533.

The fundamental importance of judicial supervision over official intrusion into privacy interests was reaffirmed by Mr. Justice Powell in his concurring opinion in *Almeida-Sanchez*, 413 U.S. at 280:

> "I expressed the view last term that the warrant clause reflects an important policy determination: 'The Fourth Amendment does not contemplate the executive officers of government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.' (cases cited)"

A few examples serve to refute the remainder of the government's arguments that the safeguards in the statute are sufficient to protect the Fourth Amendment privacy interests. For example, the Secretary characterizes an OSHA inspection as "carefully limited in . . . scope" (Brief for the Appellants, 33). This contention is belied even by events related to the instant case. Pursuant to the Secretary's motion to compel compliance, the Idaho district court entered an order authorizing the Secretary to enter upon the premises of Barlow's, Inc., and to conduct an inspection and investigation:

> "[T]hat shall extend to the establishment or other area, workplace or environment where work is performed by employees of the employer, Barlow's, Inc., and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials and all other things therein (including, but not limited to, records, files, papers, processes, controls and facilities) bearing upon whether Barlow's, Inc., is furnishing to its employees employment and a place of employment that are free from recognized hazards . . ." Record, Complaint Exhibit A (copy attached hereto as Exhibit A).

The similarity of the foregoing language to that contained in the writs of assistance is noteworthy. Note should also be taken of the considerable discretion the inspector would necessarily be required to exercise in determining what items had "bearing" upon whether Barlow's, Inc., was furnishing its employees with a proper place of employment—and, for that matter, determining what constituted a proper place of em-

ployment. While authorization for this inspection was obtained through a form of judicial review, the broad scope of the order and the discretion vested in the inspector clearly demonstrate that such inspections without independent judicial supervision would, indeed, constitute modern versions of writs of assistance envisioned by the Court in *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154, 162, (1967).

Furthermore, it must be borne in mind that OSHA's inspection function has been preempted in many instances by other regulatory agencies.[34] Judicial supervision on this issue of jurisdiction might have prevented OSHA's numerous attempts to enforce inspections against employers who are regulated by other agencies.[35] Of course, the most critical need for independent judicial review of OSHA inspections is to prevent the harassment of individual employers.[36]

The Secretary also contends that the imposition of a warrant requirement upon non-consensual inspections would impede the effectiveness of OSHA and thereby frustrate the intent of Congress. Brief for the Appellants, 37-38. Warrant requirements would, according to the Secretary, place an intolerable burden on limited judicial and enforcement resources, creating severe delays in implementing inspections and destroy-

[34] § 4(b) (1) of the Act, 29 U.S.C. § 653(b) (1).
[35] See e.g. *Newport News Shipbuilding and Drydock Co.*, OSHID § 19, 160 (1947) dealing with the Atomic Energy Commission; *N.W. Orient Airlines, Inc.*, OSHD § 21, 225 (1976) dealing with the Federal Aviation Commission.
[36] E.g., *Weyerhaeuser Co. vs. Maurice S. Reizen, et al*, No. 7-71052 (E.D. Mich., June 7, 1977), where the employer was inspected seven times with respect to the same noise standard in a short period of time and acquitted on each occasion; *Dunlop vs. Hertzler Ent., Inc.*, 418 F.Supp. 627 (1976), where inspectors attempted to inspect the employer's home because some of his employees kept their lunches in his home refrigerator.

ing the element of surprise which is essential to the enforcement of the statute. For example, throughout, the Secretary has constantly presented the spectre of employers who "often" conceal hazardous working conditions or otherwise intentionally attempt to evade the law. Brief for the Appellants, 12, 20, 22, 37-39. This argument is refuted by the provisions of the Act itself and actual experience. Despite the possibilities for intentional violation of the Act claimed by the Secretary, he admits that "since the Act's April 1, 1971, effective date, approximately 400,000 inspections have resulted in only five criminal prosecutions." Brief for the Appellants, 7, n. 3. Moreover, under current agency regulations, the Secretary's only course upon entry refusal is to obtain a court order mandating entry. 29 C.F.R. § 1903.4.[37] Judicial notice could be taken by this Court that almost any warrant procedure would be less cumbersome and less time-consuming than the contested hearings in federal court which result from the compulsory process currently utilized by the Secretary. Note should also be taken that one court, in denying a motion for an order compelling inspection, held that a showing of probable cause is required for issuance of an inspection order. *Empire Steel Mfg. Co. vs. Marshall*, Civil No. 77-48-BLG (D. Mont., Sept. 1, 1977) 15. In requesting inspection orders, which require notice of hearing and time of inspection, it would seem that the Secretary might be in violation of his own arguments for secrecy, if not of Section 29 USC 666 (f) prohibiting advance notice. Furthermore, since the procedure for obtaining a search warrant is an *ex parte*

[37] Refusal to permit entry if construed in any fact situation to involve forcible resistance or opposition subjects one to criminal liability. 29 U.S.C. § 666(a) and (h); and 18 U.S.C. §§ 111, 1114.

proceeding, there is every reason to believe that in the great majority of instances the integrity of the Secretary's desired secrecy would be maintained. In cases of entry refusal, the Secretary could simply reschedule such inspections for a later time and obtain an *ex parte* inspection warrant immediately prior thereto. Obviously, after a certain amount of time, surprise would once again be achievable in each case. Hence, the limitations placed upon the number of such inspections by the procedural requirements of a warrant could not be expected to have a devastating effect on enforcement and compliance with the government forecasts.

As a final effort by the Secretary to expand the warrantless search doctrine of *Biswell* so as to authorize warrantless OSHA inspections, the Secretary cites for authority a number of federal regulatory statutes and cases. It is submitted that not one of these statutes have been judicially construed so as to support the Secretary's position. If one considers the cases cited by the Secretary interpreting inspection provisions of the Food, Drug and Cosmetic Act (21 U.S.C. § 374(a)), each of the cases allowing warrantless FDA inspections has done so on the ground that the business inspected was pervasively regulated. In describing what is meant by "pervasive regulation" in these cases, the courts make it clear that these decisions do not constitute authority for an extension of *Biswell*. In fact, the district court in *U.S. vs. Del Campo Baking Mfg. Co.*, 345 F.Supp. 1371 (D. Del. 1972), expressly interpreted this Court's decision in *Biswell* and arrived at the result that warrantless FDA inspections were allowable in the "pervasively regulated" food and drug business:

"The fact that Congress has not required the Del

Campo business to obtain federal licenses to operate is wholly immaterial. Defendants' business of manufacturing, processing, packing and distributing food products for the introduction into interstate commerce is as 'pervasively regulated' by the federal Food, Drug and Cosmetic Act and the regulations promulgated thereunder, as if it were federally licensed. No rationale or valid distinction can be drawn for compliance inspections between a federally licensed business and one so completely regulated by the Act under the commerce power." 345 F.Supp. at 1376, 1377.

U.S. vs. Business Bldrs., Inc., 354 F.Supp. 141 (N.D. Okla. 1973) also involved the validity of warrantless inspections under the federal Food, Drug and Cosmetic Act and followed the reasoning in *Del Campo Baking* in authorizing warrantless inspections. Attention should be drawn to the fact that both *Del Campo Baking* and *Business Bldrs.* were decided before *Almeida-Sanchez, Western Alfalfa* and *G. M. Leasing Corp.* reaffirmed *Camara* and *See* and delimited *Colonnade* and *Biswell*. It should also be pointed out that there is a split among the Circuit Courts of Appeal on the issue of whether FDA inspections may be conducted without search warrants. The Third, Fifth, Eighth and Ninth Circuit Courts of Appeal have all held that non-consensual FDA inspections must be conducted pursuant to a valid search warrant. *See, U.S. vs. Alfred M. Lewis, Inc.*, 431 F. 2d 303 (9th Cir., 1970) *cert. den.* 400 U.S. 878; *U.S. vs. Thriftimart, Inc.*, 429 F. 2d 1006 (9th Cir., 1970) *cert. den.* 400 U.S. 926; *U.S. vs. Kramer Groc. Co.*, 418 F. 2d 987 (8th Cir., 1969); *U.S. vs. Hammond Mill. Co.*, 413 F. 2d 608

(5th Cir., 1969), *cert. den.* 396 U.S. 1002; *U.S. vs. Stanack Sales Co.*, 387 F. 2d 849 (3rd Cir., 1968).

In *U.S. ex rel Terraciano vs. Montanye*, 493 F.2d 682 (2nd Cir., 1974), the Court ruled that Fourth Amendment safeguard provisions were not violated by a warrantless inspection and seizure of the narcotics records of a licensed pharmacist. The Court quoted *Biswell* with approval in expressly following the rationale that regulatory inspections of pervasively licensed businesses constituted an exception to the warrant requirement.

The case of *U.S. vs. Litvin*, 353 F. Supp. 1333 (D. D.C. 1973), also apparently relied upon by the Secretary, fails to support his position for the reason that the Court held that the inspection there proceeded pursuant to voluntary consent.

Likewise, the *Biswell* construction of pervasive regulation served as the rationale in *Youghiogheny and Ohio Coal Co. vs. Morton*, 364 F. Supp. 45 (S.D. Ohio 1973), wherein a three-judge panel upheld the constitutionality of warrantless searches under the inspection procedures set forth in the federal Coal Mine Health Act of 1969, 30 U.S.C. § 1801, et seq. Although its decision was based upon implied consent, inferred from participation in the "pervasively regulated" coal industry, the Court admitted to also having been impressed by the imminent, inherently dangerous nature of the business:

> "Our view might be entirely otherwise were we not dealing with a business context of a nearly inherently dangerous type. If Congress, for example, after taking note of the wide incidence of crime, authorized warrantless entry into private homes, we would be unable to reconcile such a statute with the command of the Fourth Amendment." 364 F. Supp. at 52, n. 7.

The fact situation in *Youghiogheny* also clearly distinguishes that court's decision from the circumstances of OSHA inspections. As discussed above, the businesses subject to OSHA's jurisdiction are not historically nor pervasively regulated, and, further, the vast majority of such businesses are not of an "inherently dangerous type."

Application of the "open fields" doctrine set forth in *Western Alfalfa* was applied in the case of *U.S. vs. Western* & A.R.R., 297 F.482 (N.D. Ga. 1924).

The remaining three cases cited by the Secretary interpreting the inspection provisions of OSHA have been discussed above.[38] Suffice it to say that these cases represent weak authority, at best, for the Secretary in light of the great weight of authority on the other side of the issue.

III

BASED ON RELEVANT PROBABLE CAUSE STANDARDS, *CAMARA* WARRANTS ARE NOT "SYNTHETIC", RATHER, THEY PROVIDE PROPER PROTECTION IN A CIVIL CONTEXT.

In the event this Court determines that OSHA ad-

[38] *Supra*, n. 10 (Contra:).

ministrative inspections are not excepted from the Fourth Amendment warrant requirements, the question arises as to precisely what probable cause standards apply in an OSHA administrative search under the doctrine of *Camara* and *See*. This question appertains whether the Court affirms the decision below or remands with instructions upholding the constitutionality of Section 8(a) of the Act on the basis that it implies a warrant requirement. This "grounds-for-inspection" issue merits analysis in this case because a determination of what grounds should be required is relevant to the question of whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *Camara*, 387 U.S. at 533. In cases where warrants are required to search, the Court in *Camara* defined "probable cause" as "the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." 387 U.S. at 534. It is here, in determination of the probable cause standard for the issuance of a search warrant, that *Camara* provides for the only "balancing test":

> "Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." 387 U.S. at 537-538.

As pointed out in part IIB, there is no balancing test afforded for determining whether a proposed search should be excepted from warrant requirements. But when one analyzes what is reasonable in order to determine the probable cause standard for issuance of a warrant, the government inspection interest is bal-

anced against the absolute privacy interests which would be invaded by such inspection.

In developing its flexible probable cause standard, the Court rejected the standard normally used in criminal cases: ". . . probable cause to believe that a particular dwelling contains violations of the minimum standards prescribed by the code being enforced." 387 U.S. at 534. This "flexible" probable cause standard came under scathing attack in the dissent in both *Camara* and *See* by Mr. Justice Clark, joined by Mr. Justice Harlan and Mr. Justice Stewart. 387 U.S. at 546. Mr. Justice Clark claimed that the new "probable cause" requirement for the issuance of warrants suggested by the Court in *Camara* "would permit the issuance of paper warrants, in area inspection programs, with probable cause based on area inspection standards as set out in municipal codes, and with warrants issued by the rubber stamp of a willing magistrate." 387 U.S. at 547-548.

It is submitted that such "rubber stamp warrants" are precisely what the Secretary and *amicus* A.F.L.-C.I.O. propose in the event OSHA inspections are subject to warrant requirements. The Secretary suggests that the *Camara* probable cause standard will be met for OSHA purposes by a mere "showing that the location apparently houses a covered employee work place." Brief for the Appellants, 51. *Amicus* A.F.L.-C.I.O. contends that the Secretary could obtain a warrant by presenting to a magistrate the current administrative standards for conducting an OSHA inspection. Brief for A.F.L.-C.I.O. as *Amicus Curiae*, 24. As an example of a warrant obtained by a mere showing of a valid

public interest in the effective enforcement of a statute sufficient to justify the administrative inspection sought, *amicus* A.F.L.-C.I.O. directs attention to the case of *U.S. vs. Goldfine*, 538 F.2d 815 (9th Cir., 1976). In that case, a search was conducted pursuant to a warrant obtained under Section 510 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 880. The statute, which was passed after *Camara* and *See*, defines "probable cause" in terms of a "valid public interest" in its enforcement sufficient to justify the warrant. 21 U.S.C. § 880(d). However, *amicus* A.F.L.-C.I.O.'s example is subject to the criticism that the Comprehensive Drug Abuse Prevention and Control Act of 1970, *supra*, pervasively regulates and licenses ("registers") the manufacturers distributors and dispensers under its jurisdiction. 21 U.S.C. §§ 821-829. In fact, a valid question arises as to whether warrants would be required at all under that act in light of the close, pervasive regulation.

The question here is whether the tests suggested by *Camara* for periodic administrative inspection, based, as urged by the Secretary, solely upon the passage of time, or upon an area inspection as part of a plan to check conditions of an entire area, can be extended to the fact situations present in OSHA inspections. It is recognized that probable cause standards in administrative inspections must be different (although not necessarily "less") than the sort of probable cause required for warrants in criminal situations. *Camara*, 387 U.S. at 538. In *Camara*, the Court was dealing with health and safety inspections of area residential housing. OSHA's inspection mandate is far broader—so broad, it is submitted, that the *Camara* examples of

passage of time and area characteristic tests for probable cause would not necessarily apply. Rather, it is suggested that the third test of probable cause suggested by *Camara* should be the starting point: "The nature of the search that is being sought." 387 U.S. at 538. It is submitted that a "reasonable" probable cause standard could be based on a "principle of general justification"[39] requiring, at a minimum, a showing that the following two factors are present with regard to the specific work place to be inspected:

(1) A showing that the proposed intrusion into the subject privacy interests is justified by an overriding governmental interest in protecting people from *serious harm;* and

(2) That the proposed intrusion has been tailored as narrowly as possible consistent with the particular governmental interest.

Application of the foregoing test would require a showing by the OSHA inspector to the magistrate that the general safety and health purposes of the inspection had some direct relationship to the work environment to be inspected. In other words, the mere general showing of a valid public interest as declared in the act should not constitute sufficient probable cause for the issuance of an inspection warrant. In each case, the inspector should be required to show, as a minimum, facts demonstrating that the statutory findings of present danger to safety and health of employees apply to a reasonably relevant fact situation (e.g., an

[39]White, J.B., *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, THE SUPREME COURT REVIEW, 165, 179-180 (Philip B. Kurland, ed., 1974).

industry-wide problem, an area health hazard, or specific complaints) directly affecting the business to be investigated. It is precisely because of OSHA's unique breadth and scope that such reasonable specificity must be shown in order to achieve sufficient probable cause to justify an inspection warrant. Warrants issued on over-broad fact bases will most certainly be the "synthetic", "box-car" warrants of the type proposed by *amicus* A.F.L.-C.I.O., where the inspector will drop by the magistrate's chambers "on a regular basis—once a week, for example" and pick up a stack of form warrants. Brief for A.F.L.-C.I.O. as *Amicus Curiae*, 26.

Barlow's urges that the proposed probable cause standard would neither frustrate the operation of the OSHA program nor its ultimate purposes. *Camara*'s calls for "universal compliance" (387 U.S. at 535) and "the public interest demands that all dangerous conditions be prevented or abated" (387 U.S. at 532) should be rejected as a justification for a diluted probable cause test. The issue is not total, universal compliance, but whether the proposed probable cause test will permit an acceptable level of administrative enforcement.

The proposed probable cause standard also calls for review of the function of the magistrate. At the risk of repetition, it is submitted that there remains a great risk that the warrant procedure will become a rubber stamp process unless items of proof relevant to the particular object of inspection are left for determination by the magistrate. This court has long praised the warrant process as an "orderly procedure"[40] whereby

[40] *U.S. vs. Jeffers*, 342 U.S. 48, 51 (1951).

a "neutral and detached magistrate"[41] can make "informed and deliberate determinations"[42] on the issue of probable cause. In view of the inspecific, broad investigative goals with which the OSHA inspectors are charged, it is necessary that we trust the judgment and common sense of the magistrates to perform their critical supervisory duty of applying the general governmental need to the particular privacy interests of the employer concerned.[43] In his concurring opinion in *Almeida-Sanchez*, Mr. Justice Powell was compelled to list a number of relevant factors to be considered in developing standards for probable cause in that fact situation. 413 U.S. at 283-284. Significantly, these relevant factors all serve the function of rationally tying the broad provisions of the law to the unique facts associated with the particular privacy interests involved.

In the context of OSHA inspections, an inspector can be required to present a number of factors to the magistrate for his review, including the following: (1) the history of past violations; (2) the nature of

[41] *Johnson vs. U.S.*, 333 U.S. 10, 14 (1948).
[42] *Aguilar vs. Texas*, 378 U.S. 108, 110 (1964).
[43] The subject of administrative probable cause has been the subject of considerable analysis by commentators. *See*, e.g., White, J.R., *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, THE SUPREME COURT REVIEW, 165 (Philip B. Kurland, ed.; 1974); Lefave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, SUPREME COURT REV. 1, (Philip B. Kurland, ed.; 1967); Landynski, SEARCH AND SEIZURE AND THE SUPREME COURT, Chapter IX, Administrative Privacy, 245-262; Comment, *OSHA vs. The Fourth Amendment*, 29 BAYLOR L. REV. 283 (1977); Comment, *Administrative Inspection Procedures Under the Fourth Amendment—Administrative Probable Cause*, 32 ALBANY L. REV. 115 (1967); Comment, *Due Process and Employee Safety*, 84 YALE L.J. 1380 (1975); Comment, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 57, 196-204 (1973-1974); Sonnenreich and Pinco, *The Inspector Knocks: Administrative Inspection Warrants Under an Expanded Fourth Amendment*, 24 S.W.L.J. 418 (1970); Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607 (1974); Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CAL. L. REV. 1011 (1973).

products or chemicals produced or handled by employees and those inherently dangerous elements involved in same; (3) employee complaints and statements or complaints from competitors, suppliers, neighbors, etc., which tend to show violation of the Act; (4) the health and safety record of the employer (a) as maintained by OSHA and (b) as maintained by the employer; (5) categorical facts, such as industry-wide problems or product problems which are the subject of the national emphasis programs; and (6) jurisdictional factors.

Finally, the Court's attention is drawn to the recent case of *Marshall vs. Shellcast Corp.*, Civil No. 77-P-0995-E (N.D. Ala., August 10, 1977), as an example of the proper exercise of judicial supervision in the context of an OSHA inspection. OSHA inspectors went to the premises of defendant Shellcast Corporation, a foundry, for the purpose of conducting a compliance investigation pursuant to a national emphasis program (N.E.P.), which program targeted the iron and steel foundry industry. Denied entrance by Shellcast, the OSHA inspectors, upon affidavit, obtained an order from the magistrate directing Shellcast to allow the inspection. At issue before the district court on stipulation, the court faced the question whether probable cause had been established by OSHA. The court acknowledged the impact of the N.E.P. information, but refused to grant the requested search warrant on the ground that more particular, individualized information was available to the OSHA inspector regarding relevant probable cause facts:

"In short, the court, while certainly recognizing

What *Camara* has said, is also saying that when individualized information is present, OSHA or other similarly situated organizations cannot close their eyes to the individual situation, relying upon some national accumulated group of statistics.

• • •

"I find it unreasonable to make request for searches where the basis for the search, namely, incident rates for the particular company are not even inquired into or reported to the magistrate and indeed only statistics for the industry as a whole are used." *Marshall vs. Shellcast Corp., supra.*

The court also indicated a number of other particular, relevant facts it might have considered in the context of that case had they been present. Most significantly, this Court exercised its historical function of judicial supervision and determined the reasonableness of the probable cause showing made by the inspector in light of all the surrounding circumstances. Failure to reserve the historical position of the magistrate in deciding the relevance of the application for search to the facts of the individual case will inevitably lead to watered-down due process requirements so as to produce a "synthetic search warrant" as decried by Justice Frankfurter. Synthetic search warrants handed out in gross with no independent judicial analysis amount to the same thing as an exception to the warrant requirement.

If, in some sense of hard, pragmatic scrutiny, some compromise must be made, which is the best route to take? It would appear that this Court has already answered this question in that it began to go one

way in *Frank vs. Maryland, supra,* and then reversed itself and charted another course in *Camara* and *See.* It appears that the Court has chosen to allow the various valid interests to compete on a flexible, probable cause standard—but to do so by maintaining in the process the presence of the independent magistrate with the duty to determine the ultimate standard: Reasonableness. Therein lies the heart of of the Barlow case: The presence of the independent magistrate vested with the full authority to decide the issue of reasonableness in determining the standards of probable cause to issue inspection warrants must be maintained.

IV

CONGRESS' CLEAR INTENTION TO AUTHORIZE WARRANTLESS INSPECTIONS FORECLOSES JUDICIAL RECONSTRUCTION OF § 8(a) OF THE ACT.

A. *Congress Intended that the Act be Enforced By a Program of Warrantless Work Site Inspections.*

The Secretary contends, unequivocally, that Congress intended to establish an OSHA enforcement program containing the power to inspect all work places affecting interstate commerce without resort to search warrants issued upon a showing of probable cause. Brief for the Appellant, 12, 19-20.

Barlow's concurs with the Secretary's position. Every occupational safety and health bill introduced in either house of the 91st Congress included authority to inspect without warrants. As an author of the Act commented early this year:

> "[I]t is important to note that warrantless civil inspections are both absolutely essential to this act's enforcement and a longstanding Federal practice."
> • • •
> "When we passed this Act, we not only acknowledged that similar inspection authority was essential . . . , [w]e admitted as much by unanimous action as well as words, for no bill was introduced, reported or passed in either House which did not include such authority." 123 Cong. Rec. H163 at H164 (daily ed. January 6, 1977) (remarks of Congressman Steiger).

Section 9(a) of the original H.R. 16785 sought to authorize the Secretary of Labor, upon presentation of credentials to the owner, operator, or agent in charge, to "enter upon at reasonable times any work place where work is performed to which this Act applies; and . . . to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein . . . ." H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 6 (1970).

The membership of the House Committee on Education and Labor were made aware of and alerted to the dangers of the extraordinary powers contemplated under the bill. The minority protested the "Ill-advised inspection provisions" in the committee's report.

> "H.R. 16785 authorizes search of employer establishments for safety and health violations. Such searches

may be conducted without a warrant and individuals who are not government officials may participate in the search. Evidence so obtained may be used in a criminal prosecution. Anyone who gives advance notice of, or who forcibly resists such a search may be subject to criminal prosecution.

• • •

"The fourth amendment of our constitution was designed to safeguard the privacy and security of individuals against arbitrary invasions and searches by government officials. (*Norman See v. City of Seattle* 387 US 541; *Camara v. Municipal Court* 387 US 523). The amendment is a concrete expression of a right that is basic to a free society. (*Wolf v. Conorado* [sic], 338 US 25, 27). As a general rule, a search of private property must be decided by 'a judicial official, not by a police or government enforcement agent.' (*Johnson vs. US* 333 US 10, 14).

"Yet, instead of limiting this extraordinary power to government agents acting in carefully restricted circumstances, the bill provides for participation in the search by nongovernment personnel.

• • •

"Lastly, it should be noted that the only way an employer may test the constitutional validity of the search provided for by this legislation is by risking a conviction for forcibly resisting the effort to inspect.

"We do not oppose inspections designed to protect the public or employees from unsafe and unhealthy work conditions. But we believe that the penal and

other provisions that accompany the search procedures provided for in H.R. 16785 are untenable and unnecessary." *Id.* at p. 55 ("Additional Minority Views of Representatives Scherle, Ashbrook, Eshleman, Collins, Landgrebe, and Ruth").

The committee's report is conclusive as a showing of Congress' intent for two reasons. First, the "Steiger-Sikes substitute", H.R. 19200, was authored by Congressman William Steiger, a member of the House committee which considered H.R. 16785. The purpose for the substitute was to provide separation of certain administrative powers between the Secretary of Labor and independent commissions. 116 Cong. Rec. 38370 (1970). While Section 9(a) of H.R. 19200 described "work place" with more particularity and introduced the words "without delay" to the proposed inspection provisions (116 Cong. Rec. 31876 (1970)), the substitute was not intended to modify the presumed authority to search without warrants found in H.R. 16785.

"[T]he basic ingredients of H.R. 16785 are included in the Steiger-Sikes substitute—mandatory standards, inspections and enforcement, penalties for violations, a remedy for circumstances where a danger of harm in a work place is imminent, emergency standards for toxic or hazardous new substances.

"Where these two bills differ is in the procedural structure provided for carrying out the responsibilities created by the legislation." 116 Cong. Rec. 38370 (1970) (remarks of Congressman Steiger, coauthor of H.R. 19200.

The purpose of Section 9(a) of H.R. 19200 was explained during debate by Congressman Galifionakis for the express purpose of ensuring that all understood the extraordinary powers thereby conferred.

> ". . . I think there are some provisions of H.R. 19200 which need clarification. Unless the intent of these provisions is explained for the record, I fear that we may lose some of the effectiveness of this bill." 116 Cong. Rec. 38709 (1970).

Messrs. Galifionakis and Steiger went on to explain that the new phrase, "without delay," was meant only to add weight to the provisions of the proposed bill penalizing interference with inspectors by subterfuge to avoid immediate entry, and also that the inspector could enter a work place armed with nothing more than the credentials issued to him by the Secretary of Labor in the face of apparent attempts to withhold consent and block entry into private property. 116 Cong. Rec. 38709 (remarks of Congressmen Steiger and Galifionakis).

Congressman Steiger's comment that the inspectors would, "of course, have to act in accordance with applicable constitutional protections" does not detract from the evidence of Congress' intent. Such vague assurances demonstrate only that Congress did not intend to violate the Constitution, not that it did not intend to enact legislation that is, in fact, unconstitutional. 116 Cong. Rec. 38709.

The second reason is that the committee report remained the official report on H.R. 16785 during its

passage, except for those provisions of the "Steiger-Sikes substitute" which removed certain administrative and review powers from the Secretary of Labor (*see*, 116 Cong. Rec. 38370 (remarks of Congressman Steiger)).

On November 24, 1970, H.R. 16785, as that day amended by substitution of H.R. 19200, was adopted by the House of Representatives as an amendment to S. 2193 which had recently come from the Senate. 116 Cong. Rec. 38715, 38724, and 38733 (1970). The warrantless search provisions of H.R. 16785 were not modified by the amendment, and the language "without delay" found in the House version of S. 2193 was retained by conference committee. Section 9(a) of S. 2193, as amended, became Section 8(a) of the Act. H.R. Rep. No. 91-7765, 91st Cong., 2nd Sess., 10 and 36 (1970).

Clearly, Congress' intent was to provide for warrantless inspections *and nothing else* in furtherance of the enforcement program of the Occupational Safety and Health Act of 1970.

B. *Judicial Reconstruction of § 8(a) to Provide for Inspections Under Search Warrants is Inappropriate in the Face of Congress' Intent to Dispense with the Neutral Magistrate.*

The Secretary errs in submitting that the Court should disregard the clearly expressed legislative intent and redraft the statute to preserve the enforcement scheme. If the warrantless inspection program is found unconstitutional, the Court should, contends the Secretary, preserve the statute by judicial draftsmanship

even though Congress clearly intended that no warrants be utilized in the fast, summary, administratively efficient enforcement program envisioned.

Barlow's respectfully submits that the Secretary's position is unsupportable for two reasons. First, such reconstruction in the face of clear, contrary legislative intent would contravene well established principles of statutory construction.

> "It is clear, of course, that no act of Congress can authorize the violation of the Constitution. But under familiar principles of constitutional adjudication, our duty is to construe the statute, *if possible*, in a manner consistent with the Fourth Amendment." *Almeida-Sanchez vs. U.S.*, 413 U.S. 266, 272 (1973) (emphasis supplied).

Clearly implied in this statement is an historically recognized limitation on the judicial power to interpret legislative acts. A court's object in construing a federal statute is to ascertain the congressional intent and to give effect to the legislative will. *Philbrook vs. Glodgett*, 421 U.S. 707 (1975). Where Congress' intent is clear, the judiciary may not seek to preserve an act from constitutional infirmities by perverting the legislative will. "[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *National R.R. Passenger Corp. vs. National Assn. of R.R. Passengers*, 414 U.S. 453, 458 (1974); *Neuberger vs. Commissioner*, 311 U.S. 83 (1940); and *U.S. vs. Barnes*, 222 U.S. 513 (1912).

The various maxims of statutory construction may aid in discovering the legislative intent, but they are not rules of law and "can never override clear and contrary evidence of congressional intent." *Neuberger vs. Commissioner*, *supra* at 88. Barlow's respectfully submits that resort to rules of construction where it is clear none are needed would be the antithesis of sound statutory construction by the judiciary.

Second, Congress' purpose and intent in enacting the Occupational Safety and Health Act of 1970 is clearly and extensively set forth in § 2 of the Act. 29 U.S.C. § 651. Among the methods adopted to achieve Congress' aim was the establishment of "an effective enforcement program which . . . include[d] a prohibition against giving advance notice of any inspection and sanctions for any individual violating . . . [the] prohibition." 29 U.S.C. § 651 (b) (10).

To presume that Congress, if faced with a warrant requirement for OSHA inspections, would prefer a judicially designed enforcement program requiring resort to coercive search warrants would be speculative. Congress may choose to avoid the encumbrances of a search warrant procedure by adopting a less constitutionally sensitive enforcement program. Congressman Steiger's recent remarks about the "absolute" necessity of "warrantless civil inspections" to the present enforcement scheme lends support to this point. *See*, 123 Cong. Rec. H163 (daily ed. January 6, 1977).

As the court below suggested:

> "There are other less obtrusive and oppressive

methods of accomplishing the intended result, e.g., employer reporting requirements with provisions for employee contribution and participation; employer-employee safety committees; encouragement of employee complaints; in the organized management-labor relations field a greater and more forceful input by labor unions as the safety representative of their members; efforts toward better enforcement by the states of their health and safety laws, etc." J.S. App. A 7a-8a, n. 4.

Recently, Congress and the Executive branch of government have been actively exploring such other means of enforcement and monitoring for the Act. 123 Cong. Rec. E4793 (daily ed. July 25, 1977) (remarks of Congressman Hansen, 2nd Dist. Idaho).

C. *The Courts Which Have Held § 8(a) of the Act to Require Warrants Have Failed to Appreciate the Clear Legislative Intent to Dispense with Warrants.*

The overwhelming weight of authority coming from state and lower federal courts holds that nonconsensual, warrantless inspections by OSHA violate the provisions of the Fourth Amendment. The courts have divided, however, on the constitutionality of Section 8(a) of the Act. (*See*, footnote 10).

One line of decisions adopting the reasoning of Circuit Judge Gee in *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F.Supp. 154 (1976), has held that § 8(a) of the Act requires search warrants and is, therefore, constitutionally enforcible. The other line of decisions folowing the lead of the lower court herein has re-

jected judicial redrafting of the Act as inappropriate in the face of Congress' intent to avoid the necessary warrants.

The opinions of the first group of cases reflect the courts' reliance upon Judge Gee's analysis. *See, Dunlop vs. Hertzler Ent., Inc.*, 418 F.Supp. 627, 634 nn. 16 & 17 (D. N. Mex. 1976). The *Gibson's Products* case and Judge Gee's interpretation of the Act are founded upon an incomplete understanding of the Act's legislative history. After concluding, properly, that the warrantless search attempted in that case could not comply with the Fourth Amendment, the court turned to the question of the constitutionality of Section 8(a) of the Act. The court found the legislative history of the Act to be "generally silent" on Congress' intentions concerning warrantless searches.

"The only suggestion that the statute contemplates warrantless searches is a passing remark to that effect in the minority views on a version of the bill which was rejected. *See*, H.R. Rep. No. 1291, 91st Cong., 2nd Sess., 55 (1970). The only discussion of the 'without delay' phrase shows that it was intended to prevent an employer from thwarting inspections by avoiding the inspector's presentation of credentials. 116 Cong. Rec. 38709 (1970) (remarks of Congressman Galifionakis, quoting Congressman Steiger). The author of the 'without delay' phrase reminded the House that inspections would have to be conducted in accordance with 'applicable constitutional protections.' *Id.* (remarks of Congressman Steiger)." *Brennan vs. Gibson's Prod., Inc. of Plano*, 407 F. Supp. 154, 162 n. 18 (1976).

The court concluded that it was "spared the necessity of invalidating the OSHA inspections" provsions. 407 F. Supp. at 162.

The quoted footnote demonstrates that the *Gibson* court fai d to understand, (1) that the inspection provision originally set forth in H.R. 16785 were intended to be construed solely as providing for warrantless searches and (2) that these provisions were incorporated without charge of intent into the "Steiger-Sikes substitute" which was then passed into law. By incorrectly finding that the intent of Congress was unclear, the court was placed in a position to construe the statute as constitutional. The court bolstered its decision by pointing to provisions of the agency's Compliance Operations Manual and 29 C.F.R. § 1903.4 which formerly provided for the obtaining of "inspection warrants" upon refusal of entry. These initial provisions for inspection warrants were later deleted by the Secretary. "Equally, the inference could be drawn from these events that as the Secretary became more familiar with the Act and its administration, he amended the Compliance Manual in order to bring it into line with actual congressional intent. The Secretary seems to agree with this interpretation of his own behavior.

In the *Barlow's, Inc. vs. Usery* decision below, Circuit Judge Anderson, Circuit Judge Koelsch, and Chief District Judge McNichols rejected Judge Gee's finding of presumed congressional intent. The court below found the intent of Section 8(a) of the Act to be clear and unconstitutional, and therefore declined to judicially redraft it. J.S. App. A 10a.

Barlow's submits that Congress mandated an unconstitutional enforcement procedure which this Court must strike down by affirming the judgment below.

CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted,
RUNFT & LONGETEIG,
CHARTERED

JOHN L. RUNFT, ESQ.
IVER J. LONGETEIG, ESQ.
DAVID J. STECHER, ESQ.
Attorneys for Appellee.

EXHIBIT A.

MARION J. CALLISTER
UNITED STATES ATTORNEY
DISTRICT OF IDAHO
Room 693 Federal Building
550 West Fort Street
Boise, Idaho 83724
Telephone—342-2711, Ex. 2211

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No._____

IN THE MATTER OF
ESTABLISHMENT INSPECTION OF:
Barlow's Inc.
225 West Pine
Pocatello, Idaho

ORDER

This matter having come before the Court on an Order to Show Cause and the applicant, United States of America, having appeared and being represented by the United States Attorney for the District of Idaho, and Barlow's Inc. having appeared by its counsel,

_____ of _____, Idaho, whereat evidence was taken and argument heard, and for good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the United States of America, United States Department of Labor, Occupational Safety and

Health Administration, through its duly designated representative or representatives, are entitled to, and shall have hereby, entry upon the premises known as Barlow's Inc., 225 West Pine, Pocatello, Idaho, and upon said business premises to conduct an inspection and investigation as provided for in Section 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.), as part of an inspection program designed to assure compliance with that Act; that the inspection and investigation shall be conducted during regular working hours or at other reasonable times, within reasonable limits and in a reasonable manner, all as set forth in the regulations pertaining to such inspections promulgated by the Secretary of Labor, at 29 C.F.R., Part 1903; that appropriate credentials as representatives of the Occupational Safety and Health Administration, United States Department of Labor, shall be presented to the Barlow's Inc. representative upon said premises and the inspection and investigation shall be commenced as soon as practicable after the issuance of this Order and shall be completed within reasonable promptness; that the inspection and investigation shall extend to the establishment or other area, workplace, or environment where work is performed by employees of the employer, Barlow's Inc., and to all pertinent conditions, structures, machines, apparatus, devices, equipment, materials and all other things therein (including but not limited to records, files, papers, processes, controls, and facilities) bearing upon whether Barlow's Inc. is furnishing to its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its em-

ployees, and whether Barlow's Inc. is complying with the Occupational Safety and Health Standards promulgated under the Occupational Safety and Health Act and the rules, regulations, and orders issued pursuant to that Act; that representatives of the Occupational Safety and Health Administration may, at the option of Barlow's Inc., be accompanied by one or more employee of Barlow's Inc., pursuant to Section 8(e) of that Act; that Barlow's Inc., its agents, representatives, officers, and employees are hereby enjoined and restrained from in anyway whatsoever interfering with the inspection and investigation authorized by this Order and, further, Barlow's Inc. is hereby orderd and directed to, within five working days from the date of this Order, furnish a copy of this Order to its officers and managers, and, in addition, to post a copy of this Order at its employee's bulletin board located upon the business premises; and Barlow's Inc. is hereby ordered and directed to comply in all respects with this order and allow the inspection and investigation to take place without delay and forthwith.

Dated this____day of December, 1975.

_____

JUDGE, U.S. DISTRICT COURT